SUPREME COURT, U. S.

In the Supreme Court of the United States

OCTOBER TERM, 1971.

No. 568

CHARLES P. LUCAS, BRUCE GREEN, JR., DOROTHY M. BACON, JOHN T. GREEN, ALFRED HEAD, EDWIN L. PARMS, KENNETH W. CLEMENT, RUSSELL M. JONES and ALICK LEE,

Appellants,

v.

JAMES A. RHODES, INDIVIDUALLY and AS GOVERNOR OF THE STATE OF OHIO, TED W. BROWN, SECRETARY OF STATE OF OHIO, JOSEPH J. LaPRESTI, GOVERNOR'S ADMINISTRATOR, and RAY T. MILLER, ALEXANDER B. DEMAIORIBUS, DAN W. DUFFY and GAUL G. SHELLHAAS, MEMBERS OF BOARD OF ELECTIONS OF CUYAHOGA COUNTY, OHIO,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT IN AND FOR THE NORTHERN DISTRICT OF OHIO.

MOTION TO AFFIRM ORDER OF FEDERAL DISTRICT COURT BECAUSE OF INSUBSTANTIALITY OF QUESTIONS PRESENTED

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(Table of Contents on Inside of Cover.)

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TABLE OF CONTENTS.

Motion to Affirm Order ---------- 1

Question Presented ---------- 1

Statement ---------- 2

Argument ---------- 3

Conclusion ---------- 6

Authorities Cited.

Reynolds v. Sims, 377 U. S. 533 (1964) ---------- 6

Swann v. Adams, 17 L. Ed. 2d 501, 87 Sup. Ct. 569 (1967) ---------- 6

Wesberry v. Sanders, 376 U. S. 1 ---------- 2

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JAMES A. RHODES, INDIVIDUALLY and AS GOVERNOR OF THE STATE OF OHIO, TED W. BROWN, SECRETARY OF STATE OF OHIO, JOSEPH J. LoPRESTI, GOVERNOR'S ADMINISTRATOR, and RAY T. MILLER, ALEXANDER L. DeMAIORIBUS, DAN W. DUFFY and SAUL G. STILLMAN, MEMBERS OF BOARD OF ELECTIONS OF CUYAHOGA COUNTY, OHIO,

Appellees.

On Appeal From the United States District Court In and For the Northern District of Ohio.

MOTION TO AFFIRM ORDER OF FEDERAL DISTRICT COURT BECAUSE OF INSUBSTANTIALTY OF QUESTIONS PRESENTED.

QUESTION PRESENTED.

Does the present Ohio plan of congressional districting, which was passed in December, 1964 and was first effective with the 1966 elections, meet the "as nearly as practicable" test when the District Court found that because of population shifts since the last census, it would not be possible to create a more equal plan until new census figures were available?

STATEMENT.

Appellants attack the validity of the Ohio Congressional Districting act which was passed in 1964, following this Court's decision in *Wesberry v. Sanders*, 376 U. S. 1. Although there was no court case pending, the legislature of its own volition, attempted to comply with the *Wesberry* ruling. The plan first took effect with the congressional election of November, 1966. Appellants filed this suit some five months after the plan was enacted, but never requested that it be set for trial. When they were informed of a trial date, appellants requested that the case be postponed until after the 1966 elections. (Opinion, p. iii.)[1]

After a hearing which included exhibits and oral testimony, the three judge District Court held that "the Ohio plan of districting affords practicable equality of congressional districts as is constitutionally required." (Opinion, p. xxvi.)

Based upon Census Bureau information released in August, 1966, but using 1960 figures, the following statistics apply to the plan here attacked: districts with population in excess of the ideal district had an average variance of 6.93%, and those below had an average variance of 8.4% from the ideal. (Opinion, appendix, p. xxix.) The largest district was 13.2% over the ideal and the smallest was 20.9% under. (Opinion, appendix, p. xxviii.) However, by the time the plan went into effect in 1966, this smallest district had increased in population until it was only 7.6% under the ideal. (Opinion, appendix, p. xxix.) The 12th and 15th districts, which were under the ideal on the 1960 figures, had increased in population 24% and

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[1] Unless otherwise stated, all citations are to material printed in the appellant's jurisdictional statement, or the appendix thereto, and page references are to the pages as they appear in that jurisdictional statement and appendix.

21% respectively since 1960 (computed from figures at Opinion, appendix, pp. xxviii and xxix) while the statewide population had grown only 6.2%. (Figures at TR 93 compared to figures in Appellant's exhibit 2, page 11.)

The district court found:

> "The evidence and the exhibits offered upon the trial of this case compel us to accept as true the facts of uneven population growth and population shifting among the 24 Ohio Districts, as well as the total increase of the population of the state since 1960." (Opinion, p. xxii.)

and the Court further stated, "we are unable to find that resort to the 1960 federal census in 1967 will achieve a population disparity of any lesser degree" than the present plan. (Opinion, p. xxiv.)

The notice of appeal states that one question is whether Section 3521.01, Ohio Revised Code (Establishing the districting plan here attacked) violates the 14th Amendment of the United States Constitution. That question was presented in plaintiff's complaint, but on the trial of the case plaintiffs specifically abandoned any claims under the 14th Amendment. (Opinion, pp. iv and v.)

ARGUMENT.

In spite of the fact that the 14th Amendment claims were abandoned in the trial court, appellants have listed them as issues in the notice of appeal. Because they specifically abandoned the claim under the 14th Amendment, it is manifest that those questions are so unsubstantial as to need no further argument.

The only remaining real question is whether the present Ohio districting plan can constitutionally be used until such time as new and current population statistics are available.

The evidence shows that the 1960 census figures no longer accurately reflect population density, but there are no later statewide statistics upon which to base a plan. The District Court found that Ohio's population had grown unevenly, and that population shifts had occurred since the 1960 census. (Opinion, p. xxii.) This is obviously true even though current figures are not available for all of the districts. For example, districts 12 and 15, which are shown as underpopulated on the 1960 figures, had increased 24% and 21% respectively by the time this plan went into effect. (Computed from figures at Opinion, appendix, pp. xxviii and xxix), while the statewide population had increased only 6.2%. (Figures at TR 93 compared to figures in Appellants' Exhibit 2, page 11.) Because the new districts were super-imposed on the old 1960 census figures, which had not been tabulated along the same political subdivision lines, there is no certainty as to the 1960 population of some of these districts. For example, the Ohio Legislative Service Commission published 1960 population figures for the new districts at the time the plan was enacted in December, 1964. Twenty months later, in August, 1966 the U. S. Census Bureau also published 1960 census figures for the new districts. In ten of the districts there was disagreement between the two sources, with the differences amounting to approximately 11,000 people in both the 12th and 15th districts, and to more than 8,000 in the 1st district. (Opinion, appendix, p. xxviii.)

Because of the population growth, when the legislature passed the present plan in December, 1964, the census figures were already outdated, and had the legislature made every district exactly equal, based upon the 1960 census, districts such as the 12th would have been 18% overpopulated by the time of the first election in 1966. (25% increase for the 12th district, minus the state average increase of 6.22%.)

It was this fact which caused the legislature, when it passed the present plan in December, 1964, to take into consideration population growth figures in those instances where they were available. (Opinion, pp. xxi and xxii.) Agencies of the State of Ohio do not presently provide statewide census data. (Opinion, p. xxiv.)

In connection with this fact of uneven growth patterns the District Court stated:

> "The evidence and the exhibits offered upon the trial of this case compel us to accept as true the facts of uneven population growth and population shifting among the 24 Ohio Districts, as well as the total increase of the population of the state since 1960." (Opinion, p. xxii.)

Because of this highly uneven population growth the District Court stated: "we are unable to find that resort to the 1960 federal census in 1967 will achieve a population disparity of any lesser degree." than the present plan. (Opinion, p. xxiv.) Therefore the District Court held the present plan was as equal as practicable.

The District Court found that because of the population shifts since 1960, an attempt to create new districts before the next census would not result in a plan which was any more equal than the present one. Even if it appeared exactly equal by using the 1960 census figures, subsequent population shifts would result in there actually being population variances as great, if not greater than those under the present plan. (Opinion, pp. xxiii, xxv.) Therefore the Court held the present plan was as equal as practicable.

This is not a case where the present plan is attacked as arbitrary, or as a result of invidious discrimination. (Opinion, pp. iv and xxi.) Appellants' only contention in the trial court was that the population of the districts was

not as equal as practicable. However, they base this claim upon the outdated 1960 census figures.

The District Court stated the problem as follows: "There is apparently nothing here but a constitutional question which the plaintiffs seek to reduce to an arithmetical question, but which carries with it problems too complex for the slide rule and too elusive for the computer." (Opinion, p. xxi.) As the court said,

> "In 1960 Ohio's population was approximately 10 million, which, divided by 24 districts, equals 416,666 per district. Obviously there is no possible way in which this State, with its 88 counties, its lake and river boundaries, its increasing city populations, its diverse industries attracting its workers from within and without the State, can be divided into 24 districts each of which shall hold exactly 416,666 people." (Opinion, p. xviii.)

As this Court wisely said in *Reynolds v. Sims*, 377 U. S. 533, 578 (1964), "What is marginally permissible in one state may be unsatisfactory in another, depending upon the particular circumstances of the case," or as expressed in *Swann v. Adams*, 17 L. Ed. 2d 501, 505, 87 Sup. Ct. 569, 572 (1967) "the fact that a 10% or 15% variation from the norm is approved in one state, has little bearing on the validity of a similar variation in another state."

CONCLUSION.

For these reasons defendants respectfully urge that the plan of Congressional districting presently in use in Ohio provides a system of districting which is as equal as practicable at this time, seven years after the national census, and that the District Court was correct when it found that because of the population shifts which have

occurred since 1960, it would be impossible to create a new plan prior to 1970 which would be any more equal than the present system. Wherefore, it is respectfully submitted that the decision of the United States District Court should be affirmed.

Respectfully submitted,

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